I have requested for certain authorities, the Library here being out of reach of some of them, and I am obliged to the learned Deputy Public Prosecutor for sending them to me last month.

They are *R.* v. *Goh Choo Lan*[1] and *Lim Tuan Hong* v. *Herman Jebson & Co.*[2]

In my opinion neither of these cases helps in the determination of this point. They were however decided on the provisions of the Colony Criminal Procedure Code which has no counterpart in our Sarawak Criminal Procedure Code.

The decision of the learned magistrate has also been attacked on other grounds.

It is sufficient for me to say that on the issue of fact the court unhesitatingly accepted the evidence of the witnesses for the prosecution and rejected that of the accused, the learned magistrate having had the benefit of observing their demeanour and of listening to their evidence. He had weighed their evidence with some care against the other evidence in the case and I can discover no reason for quarrelling with him for rejecting it.

Accordingly, I would order a new trial on the same charge i.e. the first limb of section 30 of Road Traffic Ordinance — driving without due care and attention before another magistrate.

I accordingly set aside the conviction, sentence and endorsement on licence.

I express the hope that the prosecution will in view of the circumstances see fit not to proceed with the retrial, since the accused has twice been tried for the offence.

I merely feel that generally on the facts of this particular case the interest of justice would be served by taking the more humane course.

In any event I leave the matter entirely in the hands of the prosecution.

Conviction set aside.

LEE AH MOI v. PUBLIC PROSECUTOR

[R.CrJ. (Ong C.J.) March 27, 1973]
[Kuala Lumpur — Criminal Revision No. 3 of 1973]

Criminal Law and Procedure — Charge of causing death by reckless or dangerous driving — No evidence of selfish disregard for the safety of other road users — Conviction for careless and inconsiderate driving substituted — Road Traffic Ordinance 1958, ss. 34A and 36(1).

Road Traffic — Reckless and dangerous driving — Sentence — Unavoidable accident.

In this case the accused had been convicted of the offence of causing death by reckless or dangerous driving The facts showed that the fatal accident occurred at Jalan Pudu to an old women of 67 who was attempting to cross the road between gaps in vehicular traffic.

Held; the evidence did not support a conviction for the offence of causing death by reckless or dangerious driving and a conviction for careless and inconsiderate driving should be substituted.

Per Ong C.J.: "I entirely agree that reckless or dangerous driving should merit punishment which will serve as a deterrent to selfish motorists. But, as in this case, where the accident was practically unavoidable or could have been avoided only by extraordinary care and instantaneous reflexive action, I must, with all respect, say that the sentence was both harsh and excessive. The use of motor-vehicles is a necessity in this day and age. I do not think any motorist should be exposed to the hazard of going to prison for long stretches unless he drives in a manner which evinces a truly culpable disregard for the safety of other road users."

CRIMINAL REVISION.

Ong C.J.: On March 14, 1973, I received a letter from a legal practitioner calling attention to the sentences imposed on the accused in three cases of causing death by reckless or dangerous driving, under section 34A of the Road Traffic Ordinance 1958, where sentences of 12 months, 12 months and 18 months imprisonment were passed respectively and disqualification in each case imposed on holding a driving licence for all classes of vehicles for 10 years. I called for the files and decided that the sentence in any events was in need of revision.

In the instant case the fatal accident occurred shortly after noon on May 26, 1966 at Jalan Pudu, a busy thoroughfare, to an old woman of 67 who was undoubtedly attempting to cross the road between gaps in vehicular traffic. This in itself, I must say with all due regard and sympathy for the relatives of the deceased, was a dangerous thing for any pedestrian to do — especially one whose agility had been greatly diminished by age.

There was evidence of an eye-witness whom the learned president believed to be telling the truth. I have no doubt he was, but perhaps 6½ years after the event, the impression he had of the accident, both sudden and unexpected, might well have been blurred. He remembered seeing the accused's car going in a zig-zag manner for 25 feet before knocking down the old woman, and stopping 10 feet after doing so. This zig-zag "was not very pronounced"; it went on for only about 25 feet, as the woman attempted crossing the road some 20 feet in front of the accused's car and the woman fell in the middle of the road. This witness, while following the accused's car for some distance, was himself going at 25 m.p.h., so that the accused's speed of travel naturally would be about the same.

I do not think, on this evidence, it could be said with truth and certainty, that the accused was driving, as charged, "in a manner which having regard to all the circumstances (including the nature, condition and use of the road and the amount of traffic which was on the road) was dangerous to the public", within the meaning and intent of section 34A of the Ordinance. The essential characteristic of this offence is the reckless or dangerous driving which shows a selfish disregard for the safety of other road users. According to the eye-witness, he had in fact seen nothing wrong in the accused's driving until the old woman was seen attempting to cross in front of the car which hit her. This perhaps accounted for the zig-zag in evasive action.

I entirely agree that reckless or dangerous driving should merit punishment which will serve as a deterrent to selfish motorists. But, as in this case, where the accident was practically unavoidable or could have been avoided only by extraordinary care and instantaneous reflexive action, I must, with all respect, say

that the sentence was both harsh and excessive. The use of motor-vehicles is a necessity in this day and age. I do not think any motorist should be exposed to the hazard of going to prison for long stretches unless he drives in a manner which evinces a truly culpable disregard for the safety of other road users.

The accused in this case had had a clean driving record since passing his driving test in 1961. Whether or not it was true, as the eye-witness said, that the accused reversed and ran over the legs of the woman after having knocked her down, was quite immaterial and irrelevant to the question of whether he was driving recklessly or dangerously prior to the accident. The medical evidence showed that the deceased suffered not even abrasions to her legs which would certainly have been observed on medical examination. had the wheels of the car passed over them. The allegation was thus refuted by independent, unimpeachable evidence. Even if the accused did reverse his car, so as to run over the woman' legs, what was done in panic, after the ghastly experience of knocking down the old woman, should not have aggravated his punishment.

But in revision I must also consider whether the accused was guilty of any offence, if the evidence failed to establish his guilt under section 34A. There was no doubt that the old woman did get into the way of the oncoming vehicle. In town driving the likelihood of pedestrians taking such risks should have been anticipated and greater care and attention displayed in driving. I think the accused should have been more alert. I would accordingly substitute and record a conviction under section 36(1) of the Road Traffic Ordinance and sentence him to imprisonment of such term as will set him free today.

Order accordingly.

RAJALACHMI v. SINNIAH

[A.C.J. (Raja Azlan Shah J.) June 23, 1973]

[Kuala Lumpur — Civil Appeal No. 4 of 1973]

Family Law — Maintenance — Wife living in adultery — Meaning of "living in adultery" — Proof of adultery — Whether children entitled to maintenance if wife living in adultery — Married Women and Children (Maintenance) Ordinance, 1950, s.5(2).

The appellant had applied for maintenance for herself and her three children. The learned magistrate dismissed her claim for maintenance but allowed a sum of $55 per month for the maintenance of the children. He held that the appellant was living in adultery and had refused to live with the husband without sufficient reason. The appellant appealed.

Held: (1) although the learned magistrate was wrong in holding that the standard of proof required to prove adultery was one on the balance of probabilities, on the facts it had been proved beyond reasonable doubt that the appellant was living in adultery;

(2) the wife's adultery did not however affect the court's discretion to make an order for maintenance of the children;

(3) in the circumstances of this case the sum ordered for maintenance should be increased to $30 per child.

Cases referred to:-

(1) *Pandari* v. *Parkash Rao* A.I.R. 1952 Hyd. 44.

(2) *Nand Lal Misra* v. *Kanhaiya Lal Misra* A.I.R. 1960 S.C. 882.

(3) *Haji Ahmad* v. *Sadah* [1954] M.L.J. 101.

(4) *Marimuthu* v. *Thirucitambalam* [1966] 1 M.L.J. 203.

(5) *Jatindra Nath Mohan Banerjee* v. *Gouri Bala Devi* A.I.R. 1925 Cal. 794.

(6) *Kista Pillai* v. *Amirthammal* A.I.R. 1938 Mad. 833.

(7) *Ma Thein* v. *Maung Mya Khin* A.I.R. 1937 Rang. 67.

CIVIL APPEAL.

Sri Ram (*Shaharuddin Abdul Aziz* and *Zaiton binte Puteh* with him) for the appellant.

E. Devadason for the respondent.

Raja Azlan Shah J.: This appeal raises once again the familiar question of the right and duty of the husband to maintain his wife under the provisions of the Married Women and Children (Maintenance) Ordinance, 1950. It is enacted in subsection (2) of section 5 of the Ordinance that a wife "living in adultery" forfeits her right to be maintained by her husband. The subsection consists of two limbs, to wit:

"No wife shall be entitled to receive an allowance from her husband under the provisions of this Ordinance, if she is living in adultery, or if, without sufficient reason, she refuses to live with her husband."

The appellant is the wife of the respondent. She married him according to Hindu rites in 1954. There are 7 children of the marriage, 4 are now living with the respondent while 3 are with the appellant. In her application for maintenance she has made several allegations of cruelty against the respondent, who in turn has raised counter allegations of adultery and leaving the matrimonial home without sufficient reason. At the conclusion of the case the learned magistrate dismissed her claim for maintenance but allowed a sum of $55 per month for the maintenance of the said 3 children in her custody in the following manner:

(1) Bhavani (age 4 years) — $25 p.m. maintenance

(2) Genarakaran (age 15 years) — $15 p.m. maintenance

(3) Rajeswari (age 16 years) — $15 p.m. maintenance.

I am of the opinion that the learned magistrate has properly exercised his discretion in awarding maintenance in favour of the 3 children because it is settled law that a wife's adultery does not affect the court's discretion to make an order for maintenance with respect to children. The appellant has now appealed against the whole of the decision of the learned magistrate.

There is evidence on record to show that the stress and strain of the marriage relationship appeared 3 years after marriage, resulting in the appellant constantly leaving the children and the matrimonial home when she found the moment propitious. The learned magistrate also found that some time in 1965 the appellant had indulged in extra marital relations with one E. Muniandy. He strongly relied on the uncorroborated testimony of the parties' daughter, aged 9 years, (RW1), who stated that

"in 1965 one E. Muniandy used to visit their home when the respondent was at work and that during those visits she and the other children were asked to leave the flat while he and the applicant stayed there for about an hour or so."

He concluded in these words:

"R.W.1 was about 9 years old then and I do not see any reason to doubt her testimony."